

Jurisprudential filters

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Significance?

- Unless and until we consider the omnipresence of four factors that pollute the practice of criminal defense law (in the context of the representation of persons with serious mental disabilities) -- sanism, pretextuality, heuristic reasoning and false "ordinary common sense" -- we cannot adequately come to grips with all the underlying issues.

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Significance, 2

- And it is only through an understanding of therapeutic jurisprudence that we can begin to craft solutions that expose the virulence of these factors.*

* See Michael L. Perlin, "Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities, 73 WASH. & LEE L. REV. 1501, 1542 (2016); Michael L. Perlin, "Half-Wracked Prejudice Leaped Forth": Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did, 10 J. Contemp. Leg. Iss. 3 (1999).

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Sanism, 1

- Is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry,
- It infects both our jurisprudence and our lawyering practices,
- It is largely invisible and largely socially acceptable
 - Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, "On Desolation Row": *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us*, 24 Tex. J. on Civ. Libs. & Civ. Rts. 59, 95 n. 223 (2018), quoting Michael L. Perlin, *On Sanism*, 46 SMU L. Rev. 373, 374 (1992).

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Sanism, 2

- based predominantly upon stereotype, myth, superstition, and deindividuation,
 - Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?* 50 NYU Rev. L. & Soc'l Change 517, 521 (1993-94)
- reflects what civil rights lawyer Florynce Kennedy has characterized as the "pathology of oppression"
 - Morton Birnbaum, *The Right to Treatment: Some Comments on its Development*, in *Medical, Moral and Legal Issues in Health Care* 97, 107 (Frank Ayd ed., 1974) (quoting Kennedy)
- sustained and perpetuated by use of alleged "ordinary common sense" (OCS) and heuristic reasoning – to be discussed soon -- in unconscious response to events both in everyday life and in the legal process.
 - Michael L. Perlin, "Everybody is Making Love/Or Else Expecting Rain": *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. Wash. L. Rev. 481, 482 (2008) .

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Pretextuality

- Ways in which courts accept (either implicitly or explicitly) testimonial dishonesty – especially by expert witnesses – and engage similarly in dishonest (and frequently meretricious) decisionmaking.
 - Especially poisonous where such witnesses show a "high propensity to purposely distort their testimony in order to achieve desired ends."
 - Michael L. Perlin & Heather Ellis Cucolo, "Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": *The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*, 20 J. Gender, Race & Justice 431, 452 (2017) (Perlin & Cucolo, *Tolling*).

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Pretextuality, 2

- It “breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.”*
 - * Michael L. Perlin, “*And My Best Friend, My Doctor, Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 750–51 (2005).
- Courts often “employ pretextuality as a “cover” for sanist-driven decisionmaking.”**
 - ** Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEG. ISS. 3, 30 (1999).

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Heuristics, 1

- A cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks, the use of which frequently leads to distorted and systematically erroneous decisions, and causes decision-makers to ignore or misuse items of rationally useful information.
- “[T]estimony [in cases involving individuals with mental disabilities] is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the seductive allure of simplifying cognitive devices in their thinking.”
 - Michael L. Perlin, “*They Keep It All Hid*”: *The Ghettoization of Mental Disability Law and Its Implications for Legal Education*, 54 St. Louis U. L. J. 857, 875 (2010).

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Heuristics, 2

- Through their use, one single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.”
 - Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375, 1417 (1997).
- Their use “blinds us to ‘gray areas’ of human behavior.”
 - Michael L. Perlin, “*She Breaks Just Like a Little Girl*”: *Neonaticide, the Insanity Defense, and the Irrelevance of “Ordinary Common Sense,”* 10 Wm. & Mary J. Women & L. 1, 6 (2003).

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Heuristics, 3

- “Vividness” heuristic:
 - One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made
- “Availability” heuristic:
 - We judge the probability or frequency of an event based upon the ease with which we recall it
- “Typification” heuristic:
 - We characterize a current experience via reference to past stereotypic behavior
- “Attribution” heuristic:
 - We interpret a wide variety of additional information to reinforce pre-existing stereotypes
 - See Heather Ellis Cucolo & Michael L. Perlin, “They’re Planting Stories In the Press”: The Impact of Media Distortions on Sex Offender Law and Policy, 3 U. Denv. Crim. L. Rev. 185, 213-15 (2013).

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Heuristics, 4

- “Hindsight bias”:
 - we exaggerate how easily we could have predicted an event beforehand
- “Outcome bias”:
 - we base our evaluation of a decision on our evaluation of an outcome
- “Representative” bias:
 - we extrapolate, overconfidently, based upon a small sample size of which we happen to be aware
- “Confirmation bias”:
 - people tend to favor information that confirms their theory over disconfirming information
 - See Cucolo & Perlin, *supra*.

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“Ordinary common sense” (OCS)

- OCS is a “powerful unconscious animator of legal decision making.”
 - Michael L. Perlin & Naomi Weinstein, “Said I, ‘But You Have No Choice’: Why a Lawyer Must Ethically Honor a Client’s Decision About Mental Health Treatment Even If It Is Not What S/he Would Have Chosen, 15 Cardozo Pub. L. Pol’y & Ethics J. 73, 87-88 (2016)
- OCS is psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities.
 - Michael L. Perlin, “Wisdom Is Thrown into Jail”: Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness, 17 Mich. St. U. J. Med. & L. 343, 365 n. 127 (2013)

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OCS, 2

- OCS is self-referential and non-reflective: "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is."
 - Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 Temple Pol. & C.R. L. Rev. 1, 38 (2012).
- Importantly, it is supported by "our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information."
 - Heather Ellis Cucolo & Michael L. Perlin, *"The Strings in the Books Ain't Pulled and Persuaded": How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 Case W. Res. L. Rev. 637, 664 n. 143 (2019).

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The sum total of these factors

- It is impossible to truly understand the jurisprudence of how the criminal law treats persons with mental disabilities without understanding the malignancy of sanism and pretextuality.
- Sanism has pervasively corrupted all of mental disability law, and "a blinding pretextuality" contaminates all legal practice in this area.
 - Perlin & Cucolo, *Tolling*, *supra*, at 433
- These factors, along with heuristics and OCS, "distort our abilities to consider information rationally," and equally contaminate practice.
 - Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 Wash. & Lee L. Rev. 1501, 1524 n. 94 (2016).

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Some recent examples

- By way of example, in an in-press piece about traumatic brain injury and the death penalty, I said this:
 - There is a stunning disconnect between the false "ordinary common sense" of fact-finders (both jurors and judges) and the valid and reliable scientific evidence that *should* inform decisions on the full range of questions that are raised in cases involving the forensic mental health systems – predictions of future dangerousness, competency and insanity determinations, sentencing mitigation in death penalty cases, and sexually violent predator commitments.*
 - * Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, *"My Bewildering Brain Tails in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS L. REV. – (2021) (in press), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777551.

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Recent examples, 2

- And in one on how the Fifth Circuit has regularly misinterpreted the Supreme Court's opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), I said this:
 - In particular, judges must explain to jurors that they cannot rely on their false "ordinary common sense" about what remorse "looks like" or what an empathetic person "looks like." Again, judges must make clear that jurors' "ordinary common sense" is simply wrong – that it is premised on media stereotypes or, perhaps, the heuristic of one person they may know, and that it cannot be left unchecked or guide their decisions in reaching a verdict.*
 - * Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, "Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously *Atkins v. Virginia* (with Prof. Talia Roitberg Harmon & Sarah Wetzel), -- WAKE FOREST J.L. & POL'Y -- (2021) (in press), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3660564.

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Therapeutic Jurisprudence (TJ)

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What is therapeutic jurisprudence?, TJ

- A school of thought initially created by Profs. David Wexler and Bruce Winick.
 - Michael L. Perlin, "Changing of the Guards": David Wexler, *Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 Int'l J. L. & Psychiatry 3 (2019).
- A model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.
 - Michael L. Perlin, "I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5, 2015 Utah L. Rev. 881, 888.
- Ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.
 - Michael L. Perlin, "And My Best Friend, My Doctor/ Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases, 42 San Diego L. Rev. 735, 751 (2005).

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TJ, 2

- TJ studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyer roles may have either therapeutic or anti-therapeutic consequences, and questioning whether such rules, procedures and roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.

• Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. Jefferson L. Rev. 575, 585-86 (2008); Michael L. Perlin & Naomi M. Weinstein, "Friend to the Martyr, a Friend to the Woman of Shame": *Thinking About The Law, Shame and Humiliation*, 24 So. Cal. Rev. L. & Soc'l Just. 1, 10-11 (2014).

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TJ, 3

- But: "The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."

• David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 Behav. Sci. & L. 17, 21 (1993)

- Therapeutic jurisprudence "look[s] at law as it actually impacts people's lives,"

• Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 Nova L. Rev. 535, 535 (2009)

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TJ, 4

- Supports "an ethic of care,"

• Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 Clinical L. Rev. 605, 605-07 (2006)

- Attempts to bring about healing and wellness, and to value psychological health.

• Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in *Involuntary Detention and Therapeutic Jurisprudence: International Perspective on Civil Commitment* 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

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Prof. Ronner's "3 V's"

- Consider what Prof. Amy Ronner characterizes as the "three Vs":
 - Voice
 - Litigants must have a sense of voice or a chance to tell their story to a decision maker.
 - Validation
 - If litigant feels that tribunal has genuinely listened to, heard, and taken seriously her story, she feels a sense of validation
 - Voluntariness
 - Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive
 - Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 *Touro L. Rev.* 601, 627 (2008).

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TJ sources

- Change in judicial temperament
- Changes in political and social climates
- Better behavioral and empirical research tools
- Development of other sophisticated schools of jurisprudential analysis.
- The question to focus on here:
 - How can therapeutic jurisprudence be employed in efforts to ensure that the intersections between the law and persons with mental disabilities in the criminal justice system do "value psychological health" and comport with an "ethic of care"?

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TJ and the issues before us

- There is a robust literature on TJ as it relates to every aspect of criminal defense law.*
- As we proceed, this should be in your minds at all times: What are the TJ implications of our caselaw/statutes/lawyer roles with regard to [each substantive topic]?

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TJ & the issues before us, 2

- I believe that a TJ analysis will illuminate the underlying legal issues *and* the underlying societal biases in every substantive aspect of criminal law and procedure:
 - All issues involving competency/incompetency
 - The insanity defense
 - The right of forensic patients to refuse treatment
 - The death penalty
- See Michael L. Perlin & Heather Ellis Cucolo, *Mental Disability Law: Civil and Criminal* (3d ed. 2016) (2020 update), §2.6, at 2-39 to 2-70.3

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Some recent examples in my writing

- In my piece on psychopathy and punishment, I said this:
 - TJ also requires individualization. That is, it demands that persons subject to legal regulation be considered as individuals, and not simply as a labeled group.
 - Concepts from TJ that would recognize the need for such individualized treatment could contribute to enhanced, less biased screening processes, and less automatic discipline for individuals in jail and prison settings who may, due to a mental health diagnosis, be more likely to show violent or aggressive behavior. *
 - * Alison J. Lynch & Michael L. Perlin, "I See What Is Right and Approve, But I Do What Is Wrong": *Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. – (2021) (in press), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729503.

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Examples, 2

- And, in an upcoming piece about Bob Dylan's song *Hurricane* and what really happened in the Rubin (Hurricane) Carter murder trial, I say this:
 - One of its lodestars is a commitment to dignity. I believe that the law "must embrace the principles and tenets of therapeutic jurisprudence as a means of best ensuring the dignity of [persons before the court.]" this focus will also diminish the likelihood that shame and humiliation will permeate the legal proceedings.

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Examples, 3

- "There was no dignity – of any sort – in Carter's trials, not an iota of effort to increase "healing and wellness," and no effort to establish an "ethic of care." This was a lost opportunity -- had the treatment of the defendant been radically different, some genuine healing might have taken place. Also, if TJ principles were invoked and accepted, it would have been such an opportunity to bring healing to a community as torn asunder as was Paterson; this opportunity was irrevocably lost."*

- * Michael L. Perlin, "Pistol Shots Ring Out in the Barroom Night"; Bob Dylan's "Hurricane" as a Course (or Exam) in Criminal Procedure, -- *Am. J. Crim. L.* -- (2021), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764042

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Examples, 4

- And in a piece on TJ, juvenile sentencing and neuroimaging, I said this:

- TJ can encourage and facilitate the child's sense of individual autonomy, self-determination, and choice.
- It is imperative to ensure that lawyers working with individuals with trauma-related mental disabilities -- a universe that includes so many of the juveniles being sentenced, especially those being sentenced as adults -- are sensitive to the rights and needs of such individuals by utilizing a trauma-informed approach to lawyering. Only a TJ approach can possibly remediate this reality.

- * Michael L. Perlin & Alison J. Lynch, "Some Mother's Child Has Gone Astray": *Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing*, -- *FAM. CT. REV.* -- (2021), accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3729503.

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"The hidden prejudices"

- I titled a book some twenty years ago, **The Hidden Prejudice: Mental Disability on Trial (2000, American Psychological Ass'n Press).**

- I did this because I believed then (and now) that the biases that I have discussed in this segment *are* hidden in ways that infect everything that happens (both in court and out of court) in cases involving defendants with mental disabilities.

- As time has gone on, I have come to realize that it I only by articulating these contaminating factors -- and calling them out -- that we can remediate what has been happening to our clients forever.

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Its relation to criminal law practice

- As the afternoon goes on, please keep what I've said here as a post-it in your mind, and think about cases of yours that have stayed with you (and there are some that have stayed with me for nearly 50 years):
 - Was this court sanist? Was it pretextual? Did heuristic reasoning lead to the court's behavior? Did the judge's decision incorporate his/her self-referential "ordinary common sense"?
 - And: to what extent can we look at therapeutic jurisprudence as a means of ameliorating the situation, and of bringing dignity and voice to our clients?

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The International Society for Therapeutic Jurisprudence

- Several years ago, some of us created this international society (see intl tj.com), as a means of bringing together professors, practitioners, expert witnesses, and others who have the same values as we do.
- I'm an honorary life president and a current member of the Board of Trustees.
 - If you have the feeling I always had when I was a criminal defense lawyer all those years ago – that no one else *understands* what we do (nor cares about it much) – this is a place where you would truly feel at home.

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